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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 406

HUGH MILLER MERCER, *et al.*; *Appellants*,

—against—

ARTHUR I. HEMMINGS, *et al.*, *Appellees*.

No.

HERMAN W. BEVIS, *et al.*, *Appellants*,

—against—

MARK W. EASTLAND, *et al.*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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July 22, 1967.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement	4
(1) The Parties to the Litigation	4
(2) The Litigation and Decisions Below	5
The Questions Are Substantial	14
(1) The Importance of the Questions	14
(2) The Constitutional Gravity of the Questions	16
Conclusion	26

TABLE OF AUTHORITIES

CASES: PAGE

Aptheker v. *Secretary of State*, 378 U. S. 500 23

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 19

Bevis v. *Eastland*, 186 So. 2d 818 (Fla. D. C. App. 1964) 2, 10, 25

Bevis v. *Eastland*, 194 So. 2d 587 (Fla. Sup. Ct. 1966) 2, 12

Cooley v. *Board of Wardens*, 12 How. 298 20

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 3

Dean Milk Co. v. *City of Madison*, 340 U. S. 349 .. 19

Edwards v. *California*, 314 U. S. 160 23

Griswold v. *Connecticut*, 381 U. S. 479 23

H. P. Hood & Sons v. *Du Mond*, 336 U. S. 525 ...19, 20

Huron Portland Cement Co. v. *City of Detroit*, 362 U. S. 440 20

Lathrop v. *Donohue*, 367 U. S. 820 22

Loving v. *Virginia*, 87 S. Ct. 1817 21

McLaughlin v. *Florida*, 379 U. S. 184 24

Mercer v. *Hemmings*, 170 So. 2d 33 (Fla. Sup. Ct. 1964) 2, 8

Mercer v. *Hemmings*, 194 So. 2d 579 (Fla. Sup. Ct. 1966) 2, 12, 25

Morgan v. *Oosterhoudt*, 96 So. 2d 139 (Fla. Sup. Ct. 1957), *appeal dismissed*, 355 U. S. 603 21

Naim v. *Naim*, 350 U. S. 891 21

Polar Ice Cream & Creamery Co. v. *Andrews*, 375 U. S. 367 ..... 3, 21

PAGE

Railroad Transfer Service, Inc. v. City of Chicago, 386 U. S. 351 21

Schware v. Board of Bar Examiners, 353 U. S. 232 ..... 22, 24, 25

Shelton v. *Tucker*, 364 U. S. 479 23

Sherbert v. *Verner*, 374 U. S. 398 23

Silver v. *New York Stock Exchange*, 373 U. S. 341 ..... 20, 22

Slaughter-House Cases, 16 Wall. 36 25

South Carolina Highway Dep't v. *Barnwell Bros.*, 303 U. S. 177 23

Southern Pacific Co. v. *Arizona*, 325 U. S. 761 20

Spanos v. *Skouras Theatres Corp.*, 364 F. 2d 161 (2d Cir. 1966); *cert. denied*, 385 U. S. 987 25-26

Sperry v. *Florida*, 373 U. S. 379 26

State Board of Accountancy v. *Webb*, 51 So. 2d 296 (Fla. Sup. Ct. 1951) 19

Toomer v. *Witsell*, 334 U. S. 385 ..... 20, 26

United States v. *Carolene Products Co.*, 304 U. S. 144 23

United States v. *Shubert*, 348 U. S. 222 18

United States v. *South-Eastern Underwriters Ass'n*, 332 U. S. 533 18

CONSTITUTION:

U. S. Const. art. I, § 8 ..... 4, 8, 10, 11, 12, 17-21

U. S. Const. amend. XIV, § 1 ..... 4, 8, 10, 11, 12, 22-26

STATUTES AND RULES:

28 U. S. C. § 1257(2) 2

28 U. S. C. § 2101(c) 2

17 C. F. R. § 210.2-01(a) (1964) 26

PAGE

Florida Accountancy Law (Chapter 473, Florida Statutes):
Section 473.03 ..... 5, 7
Section 473.08 ..... 7, 11, 13
Section 473.14 7
Section 473.16 ..... 6, 7, 12, 13, 17, 18, 19, 20
Section 473.19 ..... 7, 12
Section 473.23 ..... 6, 7, 12, 13, 17, 18

Florida Administrative Procedure Act, F. S. 120.31 10

Rules of the Florida State Board of Accountancy:
Rule 20-7.02 7
Rule 20-9.03 ..... 8, 12, 17
Rule 20-9.04 ..... 9-10, 11
Rule 20-10.01, .02, .03 6

MISCELLANEOUS:

53 A.B.A.J. 353 (1967) 21
American Bar Association, Canons of Professional Ethics 33 21
American Bar Foundation, Unauthorized Practice Statute Book (1961) 21
McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 22
Strum, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967) 23
West Publishing Company, Rules for Admission to the Bar (1963) 21
Note, 67 COLUM. L. REV. 731 (1967) 21
Note, 80 HARV. L. REV. 1711 (1967) 21
Comment, 5 MICH. L. REV. 415 (1958) 22

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants, the partners of Price Waterhouse & Co. (hereinafter Price Waterhouse), appeal from two judgments of the Supreme Court of Florida. The judgment in *Mercer* v. *Hemmings* affirmed in part a supplemental decree of the Circuit Court for Alachua County which enjoined Price Waterhouse from practicing accountancy in Florida. The judgment in *Bevis* v. *Eastland* affirmed a judgment of the Florida District Court of Appeal, First District, which upheld the action of the Florida State Board of Accountancy

(hereinafter the Board) in denying certificates by reciprocity to certain of appellants. This single jurisdictional statement for both cases on appeal is being filed pursuant to Rule 15(3) of this Court.

OPINIONS BELOW

The opinion of the Supreme Court of Florida in *Mercer* v. *Hemmings* is reported at 194 So. 2d 579 (1966); its prior opinion in the same case is reported at 170 So. 2d 33 (1964). The opinion of the Supreme Court of Florida in *Bevis* v. *Eastland*, affirming the judgment of the District Court of Appeal reported at 186 So. 2d 818 (1966), is reported at 194 So. 2d 587 (1966).* All four opinions are set forth in Appendix A.* The decree and supplemental decree of the Circuit Court in *Mercer* v. *Hemmings* are also set forth in Appendix A.

JURISDICTION

The judgments of the Supreme Court of Florida, affirming the injunction against Price Waterhouse and affirming the denial of certificates by reciprocity, were dated November 23, 1966, and were entered on February 22, 1967. Timely petitions for rehearing were filed in both cases and denied on February 22, 1967. The judgments are set forth in the opinions of the court below and in its orders denying rehearing (Appendix A).

A notice of appeal was filed in each case in the Supreme Court of Florida on May 23, 1967. The jurisdiction of this Court to review these cases on appeal is conferred by 28 U.S.C. §§ 1257(2), 2101(c) (1964). The following deci-

*The Appendices to this Jurisdictional Statement are submitted under separate cover.

sions sustain the jurisdiction of this Court to review on appeal the judgments below: *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

QUESTIONS PRESENTED

1. Whether Chapter 473, Florida Statutes, regulating the practice of accountancy, as implemented by rules and enforcement procedures adopted by an administrative board of local accountants, contravenes the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution when it operates to promote a local monopoly and to prevent the partners of a national accounting firm, with unquestioned professional qualifications and with a record of sixty years of activity in Florida without injury to the public, from continuing to perform necessary accounting services for clients engaged in interstate commerce?

2. Whether Chapter 473, Florida Statutes, contravenes the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution when, having required all partners of a national accounting firm to possess Florida licenses, it confers upon the State Board of Accountancy the discretion to deny licenses to the members of the firm on grounds unrelated to professional qualifications, and thus make it impossible for that firm to perform necessary accounting services in Florida for clients engaged in interstate commerce?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the commerce clause, U. S. Const. art. I, § 8, and the due process, equal protection, and privileges and immunities clauses, U. S. Const. amend. XIV, § 1. The statutory provisions involved are the Florida Accountancy Law (Chapter 473, Florida Statutes) and the Rules of the Florida State Board of Accountancy adopted pursuant thereto. The pertinent provisions are set forth in Appendix B.

STATEMENT

(1) The Parties to the Litigation.

(a) *The Price Waterhouse firm.* Appellants are the partners of the Price Waterhouse firm, a national firm of independent public accountants. The firm has for many years rendered accounting services in all of the states of the United States, including Florida. At present it is comprised of more than 150 partners, each of whom has qualified as a certified public accountant by virtue of an examination in one or more jurisdictions, and it has offices in over thirty states. The firm first performed services in Florida as early as 1906, and its Florida activities in behalf of clients engaged in interstate commerce have grown ever since, particularly in the post-war period along with the tremendous expansion of nationwide businesses into the state. The firm and associated Price Waterhouse firms operate in most other parts of the free world. Their ability to practice freely under the Price Waterhouse name is curtailed only in Egypt, the

Philippines, and Florida (Ex. 11, pp. 4, 18, 21; Ex. 13, p. 10; Ex. 14, p. 7).*

(b) *The Florida Board.* Appellees are the five members of the Board. Each of them holds a certificate as a certified public accountant issued by the Board, as required by F. S. 473.03 (M. R. 412-13, 426). The Board is closely affiliated with and responsive to the views of the local Florida accountants, as is evidenced by the fact that each is in public practice in Florida, and by the fact that the Executive Secretary of the Board also serves as Managing Director of the Florida Institute of Certified Public Accountants (Ex. 15, pp. 12-16).**

(2) The Litigation and Decisions Below.

(a) *Background of the Litigation.* For several decades Price Waterhouse was able to perform the relatively modest volume of services in Florida then required by its interstate clients by sending staff temporarily into Florida. These activities, of a relatively sporadic character, were performed under temporary licenses issued by the Board. By 1960, however, the volume and nature of required Florida work had so expanded that it became necessary for Price Waterhouse to establish a resident staff in Florida. In 1962, the Board responded by adopting a rule prohibiting such practice with a resident staff unless every member of the Price

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*Record references in *Mercer* v. *Hemmings* are preceded by the designation "M. R." except for references to the deposition testimony introduced as exhibits during the trial—transmitted to this Court in the original by the Clerk of the Supreme Court of Florida—which are preceded by the exhibit number of the particular deposition. Record references in *Bevis* v. *Eastland* are preceded by the designation "B. R."

**The Executive Secretary was originally employed by the Institute in order to "merge" the activities of the Board and the Institute. The Secretary maintains a joint office, some of whose personnel are compensated by the Institute and some by the Board. He also performs lobbying services in behalf of the Institute before the Florida legislature (Ex. 15, pp. 12-16).

Waterhouse firm obtained a permanent Florida license. However, the residence and clerkship provisions of the statute and regulations made it impossible for them to obtain such licenses. Appellants promptly commenced this litigation, which has now culminated in the decisions below.

Although the professional competence of Price Waterhouse is unquestioned, these decisions prevent it from performing accounting services in Florida for its interstate clients and require it to turn over its business for those clients to local accountants.

(b) *The Restrictive Statutory Scheme.* Since 1931, the practice of accountancy has been regulated in Florida by Chapter 473 of the Florida Statutes, a statute concededly adopted in order to make it virtually impossible for national firms to practice in Florida other than on a transient basis (Ex. 10, p. 84; Ex. 12, pp. 65-66). The statute requires that any person performing accounting services obtain a certificate (*i.e.*, a license) from the Board, either (a) temporary or (b) permanent by reciprocity or examination. The heart of the restrictive regulatory scheme, however, is contained in F.S. 473.16 and 473.23, which provide in substance that no person may practice accountancy within the state as a member of a firm unless not only he but every one of his partners holds a Florida certificate authorizing such practice.*

Prior to this litigation, the exclusionary purpose of those provisions had been successfully implemented by statutory requirements of two years' prior residence and "clerkship" with a Florida certified public accountant as

*The statute makes it unlawful for a Florida CPA to practice as the representative, agent or manager of anyone not licensed by the Florida Board. F. S. 473.16, 473.23. And the Board has, during the course of this litigation, acted implementing rules which prohibit the formation of the professional relationship of representative, agent or manager whenever the out-of-state accountant exercises any significant control, by way of supervision, financial assistance or otherwise, over the Florida CPA. *See* Rules 20-10.01,.02,.03.

conditions precedent to application for Florida certification by reciprocity (*i.e.*, without re-examination) pursuant to F.S. 473.19, or by examination pursuant to F.S. 473.08. As for certification by examination, F.S. 473.08, effective in 1956 and implemented by Board Rule 20-7.02, prescribes detailed undergraduate course requirements—apparently taken from the current curriculum of the University of Florida—some of which were not even in existence when many of the Price Waterhouse partners were originally certified (in each instance by examination). These undergraduate course requirments must be met before an applicant, no matter how many years of demanding experience he may have had after certification by examination in another state, may even *sit* for the Florida examination.

(c) *Price Waterhouse's Limited Practice Under Temporary Certificates.* As a result of this highly restrictive statutory scheme, the activities of Price Waterhouse were circumscribed in Florida to a degree unmatched by any other state in the Union. The firm was not able to follow the practice utilized in most other states of establishing an office with one or more resident partners, each meeting all local requirements, since F.S. 473.16 and F.S. 473.23 make unlawful any such operation unless all nonresident partners also obtain Florida certification (which they manifestly could not do in view of such requirements as residence and clerkship). The firm was instead relegated to a limited practice under "temporary certificates," which were issued pursuant to F.S. 473.14 for a ninety-day period and permit only performance of a specific engagement entered into outside the state. However, these temporary certificates were subject to issuance only at the discretion of the Board, and it began to resist granting them in 1962, in the circumstances described below.

During the year 1960, appellants' volume of Florida work for interstate clients having grown to substantial proportions, appellants opened a private work space in Miami, staffed by resident personnel, in order to perform the year-round accounting and auditing activity required by their clients' expanding operations there, and another work space was opened in Tampa in 1962. However, appellants carefully avoided any activity giving the appearance of holding themselves out to the Florida public as authorized to practice under Florida law; indeed, the Price Waterhouse name was kept off the doors of the work spaces, and out of the building and telephone directories (Ex. 2, pp. 5, 18, 19, 41, 46-48; Ex. 7, p. 9; Ex. 9, pp. 13-14, 48, 50, 52, 53-54, 57).

(d) *Discontinuance of Temporary Certificates and Institution of Mercer* v. *Hemmings.* The Board learned of the existence of the work spaces in 1962. It immediately passed an "emergency" rule (Rule 20-9.03) prohibiting the issuance of temporary certificates to those maintaining full-time offices and resident personnel in Florida (Ex. 15, pp. 41-42). Appellants promptly instituted the first of these two actions, *Mercer* v. *Hemmings,* in the Circuit Court for Alachua County, asserting that the statute and rule, taken together, as applied to them violated the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution (M. R. 421-22). The Board counterclaimed for an injunction, alleging that appellants were violating the law by their practice without appropriate certification. The circuit court rejected appellants' constitutional claims. It upheld the position of the Board and granted its counterclaim (M. R. 586-87). Appellants appealed to the Supreme Court of Florida (M. R. 599).

(e) *The First Mercer* v. *Hemmings Decision.* The Florida Supreme Court in an opinion filed July 29, 1964, held that, while appellants were subject to regulation by

the Board even though they did not hold themselves out to the Florida public, the new rule limiting temporary certificates could not constitutionally be applied to them in light of the stringency of Chaper 473, which had made it virtually impossible for them to obtain permanent CPA certificates because of residence and clerkship requirements. It further held that permanent certification requirements could not be so "hedged" as to make it "virtually impossible" for nonresidents to comply therewith and that accordingly appellants were entitled to continue to practice in the state under temporary certificates until they had reasonable opportunity to qualify for permanent certificates either by reciprocity or by examination, *"without regard to residence or clerkship requirements"* of the statute (App. A, p. 39a) (emphasis added).

(f) *The Board's Denial of Appellants' Applications for Permanent Certificates.* The apparent elimination by the Florida Supreme Court of such artificial barriers to licensing as residence and clerkship seemed to clear the way for certification of all the Price Waterhouse partners, since their professional competence was unquestioned. Accordingly, all 144 of the then partners promptly filed applications for permanent certificates by reciprocity pursuant to F. S. 473.19 (M. R. 229-31).*

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*The Board's attitude toward appellants and the national accounting firms is also demonstrated by a rule change which the Board adopted during this period. On April 2, 1965, the very day after appellants had filed their applications for reciprocal certificates, the Board amended its Rule 20-9.04, relating to criteria for granting reciprocal certificates (M. R. 252-54). Prior to amendment, the Rule had required an applicant to show that:

> ". . . at the time his original certificate was issued by a state, or political sub-division of the United States, or by a foreign country, he could have met the requirements then in *effect* in the State of Florida for the issuance of a certificate as a Certified Public Accountant. . . ." (Emphasis added.)

This Rule was left untouched with respect to applicants who met the statutory two-year residence and clerkship requirements. As to applicants not meeting those requirements, however (notably repre-

The Board, however, did not give up so easily. Acting in June and July, 1965 on seven of the applications filed, it summarily denied all of them, without a hearing and without adverting to the applicants' professional qualifications. With respect to six of the applications, the Board asserted two grounds of denial, (i) that the applicant had been originally certified by examination in a state which did not extend "similar privileges" to Florida accountants and (ii) notwithstanding the decision in *Mercer* v. *Hemmings* eliminating residence criteria, that the applicant was not a resident of Florida. With respect to one applicant, the Board denied it on the sole ground that the applicant was not a resident of Florida (B. R. 20-21).

(g) *Institution of the Bevis* v. *Eastland Proceeding.* Appellants challenged the action of the Board by bringing the second of these two actions, *Bevis* v. *Eastland.* This action took the form of a petition for certiorari in the District Court of Appeal under the Administrative Procedure Act, F. S. 120.31, contending that the Board action was palpably inconsistent with the prior holding of the Supreme Court of Florida in *Mercer* v. *Hemmings* and in any event inconsistent with the commerce, due process, equal protection and privileges and immunities clauses of the United States Constitution (B. R. 23). The District Court of Appeal upheld the action of the Board, rejecting appellant's constitutional claims (Appendix A, pp. 23a-24a). Appellants sought review of that decision in the Supreme Court of Florida.

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servatives of the national firms), the Rule was amended to provide that:

"... applicant meets the educational requirements of the State of Florida for certification by examination *in effect on the date of the application for certificate by reciprocity.*..."
(Rule 20.04 (2)(b) (emphasis added).

(h) *The Appeal from the Circuit Court's Supplemental Decree in Mercer v. Hemmings.* In addition to instituting *Bevis* v. *Eastland*, appellants were also forced to seek appellate review of the supplemental decree entered by the Circuit Court on remand from the first *Mercer* v. *Hemmings* decision, on the ground that it was inconsistent with that decision. For despite the Florida Supreme Court's determination in that case that the Board's rule denying temporary certificates to appellants could not be constitutionally applied to them, the Circuit Court's supplemental decree found appellants to have violated the law by practicing without any certificates and accordingly sustained the Board's counterclaim for an injunction against their practice in Florida except to the extent the Board might see fit to grant certificates in the future. That injunction was stayed for an indefinite period in order to permit appellants to apply for permanent certificates, as hereinabove described. Appellants in their appeal again contended that the Circuit Court's decision violated the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution (M. R. 116, 137-48).

(i) *The Board's Motion for Vacation of Stay of Injunction.* Prior to final argument and decision in the two appeals before the Supreme Court of Florida, the Board moved in that court to vacate the stay of the Circuit Court's injunction, in order to force the Price Waterhouse firm to get out of the state. In support of its motion, the Board asserted, among other things, that (i) the vast majority of appellants were nonresidents and (ii) some of the older members of Price Waterhouse who had been previously certified in other states many years ago not only were ineligible for certificates by reciprocity by virtue of amended Rule 20-9.04 (*see* note, pp. 9-10 *supra*) but could not even qualify to take the examination under F. S. 473.08. Hence, since Chapter 473 requires that a firm can only practice in

Florida if all of its members are certified (F. S. 473.16, F. S. 473.23) and since the Board itself had already denied a number of appellants' applications for reciprocal certificates, the Board argued that the Price Waterhouse firm could not practice in the state because at least some of its members could never become certified (M. R. 248-67).

(j) *The Decisions Below.* The Supreme Court of Florida in its opinions filed November 23, 1966, rejected appellants' constitutional claims, in essence endorsing the position of the Board and repudiating its 1964 decision in *Mercer* v. *Hemmings*. In contrast with its earlier determination that the Board could not constitutionally deny temporary certificates to appellants by reason of Rule 20-9.03, the court held that Price Waterhouse had only a "privilege," not a right, to work in Florida under temporary certificates, at the discretion of the Board. It further held that, despite its prior opinion that the provisions for permanent certificates by reciprocity could not be unreasonably "hedged," the Board had broad discretion to deny applications for reciprocal certificates if the states of appellants' original certification did not conform to the Board's concept of "similar privileges" for Florida accountants—although, in fact, the states involved do extend such privileges.* *It also held, in square and inexplicable contradiction to its*

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*All of the states involved in *Bevis* v. *Eastland* do provide for reciprocity (R. R. 361-66, 369-74, 377-85, 387-90). Indeed, it is incontestable that New York (and presumably all of the other states involved) have in the past issued reciprocal certificates to Florida accountants (R. R. 174-75). None of these states, moreover, has a provision comparable to the onerous F. S. 473.16. Finally, F. S. 473.19 on its face does not *require* that reciprocal certificates be denied where the state of original certification does not grant similar privileges. Nevertheless, the court below indicated that the Florida legislature has conferred virtually unlimited discretion upon the Board, even as to matters of statutory interpretation (both Florida statutes and those of other states).

prior opinion, that the Board was entitled under the statute to deny reciprocal certificates on the ground of nonresidence. It reaffirmed (at some length) its earlier determination eliminating the two-year residence requirement for certificates by examination, but by its language indicated that a requirement of residence at the time of application was still permissible (the interpretation since followed by the Board).*

Finally, and most significantly, the court held that F. S. 473.16 and F. S. 473.23, requiring that *all* of the Price Waterhouse partners must be Florida-certified before the firm could practice in the state, were valid. Recognizing that, under the standards established by the Board and judicially upheld, Price Waterhouse could not conceivably qualify *all* of its partners, the court directed that upon remand the Circuit Court should allow a reasonable time for Price Waterhouse to hand over the Florida portions of its clients' business to Florida accountants (Appendix A, p. 16a). The court thus gave full rein to the efforts of the Board to force the Price Waterhouse firm to close its work spaces and move its personnel out of the state. In effect, it granted the Board's motion to vacate the stay of injunction.

The decisions of the Florida Supreme Court are entirely harmonious with the prevailing attitude of the local profession. Following those decisions, Price Waterhouse and other national firms unsuccessfully attempted to achieve a legislative remedy by amendment of the statute. While their pro-

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*The court below voided the statutory two-year residence requirement for obtaining a license by examination (see F. S. 471.08), but declined to state (even though appellants' petition for rehearing requested clarification on that precise point) that the statutory requirement of residence at the time of examination was also void. The petition for rehearing and supporting affidavit in the Supreme Court of Florida are set forth in Appendix C. The Board has since taken the position that residence at the time of examination is required. See Appendix D, p. 113a.

posal was under consideration by the legislature, the Board submitted a self-serving report bluntly summarizing its conception of the problem: "Florida has become a rich market for accounting services to local businesses and the out-of-state national firms want a part of it. The Florida practitioners do not want them to have it." (Appendix D, p. 92a.) At the same time the Board readily conceded what it has never denied: "There is no question as to the technical competency [of Price Waterhouse] . . . ." (Appendix D, p. 95a).*

THE QUESTIONS ARE SUBSTANTIAL

(1) The Importance of the Questions.

These cases are important because of the obstacles presented by Florida's statutory scheme, as interpreted and upheld by the court below, to the nation-wide practice of accountancy so necessary to the free flow of interstate commerce.

Corporations operating in interstate commerce typically draw capital and financing from investors and creditors in many states. Such investors and creditors need reliable and credible financial information in order to make decisions to enter into, withdraw from, or continue their investments in or loans to such corporations.

The required reliability and credibility is imparted to corporate financial statements by an independent public accountant who audits those statements and expresses his opinion thereon. In the case of a company engaged in

*This report and the testimony of the Board's Chairman before a joint committee of the Florida House, though both obviously in many respects self-serving, so fully reveal the current attitude of the Board and the local accountants that they are produced in full in Appendix D. A brief but pungent newspaper editorial comment on the local accountants' resistance to changes in the Florida law is set forth in Appendix E.

operations in many states, the auditor must examine not only the financial records and transactions of the parent corporation but also those of its consolidated subsidiaries and divisions whereever located, so that he may attest to the fairness of the financial position and results of operations of the whole interstate business. Without such attestation by means of such an integrated overall audit, the credibility and reliability of financial statements would be substantially diminished, and the flow of creditor and investor capital across state lines would be impeded.

If a single auditing firm is to bear the ultimate responsibility for certification of a corporation's financial statements reflecting operations in many states, that firm can fully undertake and discharge such responsibility only if it itself conducts the audit work. This necessity for overall audit responsibility, particularly in the case of large corporations whose financial statements must meet the exacting scrutiny of regulatory agencies, the financial community and the investing public generally, has led to the development of accounting firms such as Price Waterhouse which operate across state boundaries in order to meet the needs of clients likewise operating across state boundaries, and the needs of investors in those clients.

There are no differences in accounting principles or auditing standards resting on geographical or political distinctions among states. Indeed, all states, including Florida, give a uniform accounting examination, prepared by the American Institute of Certified Public Accountants, and all states, including Florida, use that Institute's grading service (Ex. 11, pp. 6, 8-9; Ex. 12, pp. 54-55). While all states regulate the practice of accountancy, none of them (with the exception of Florida) presently imposes any obstacle to the performance of necessary accounting services by nonresident firms. The trend is towards the adoption of the Model Bill.

of the American Institute of Certified Public Accountants (Ex. 14, sub-Ex.12), now in force in nineteen states, which requires that a permanent resident office be managed by a general partner, certificated and governed by the state and its regulatory agencies and answerable for the conduct of all his partners, and that each partner of the firm possess a certificate in good standing from some state. A few states, however, require all partners of a firm to be licensed in the state as a prerequisite to practice, but all of them (other than Florida) have made such licenses readily available to accountants engaged in interstate practice on the basis of their licenses from another state. Such state licensing policies recognize that with the benefits of expanded interstate corporate activity, and the disclosure needs of investors, as exemplified by the requirements of federal securities laws and regulations, must come likewise the realization and acceptance of the fact that the practice of accountancy as well is national in scope and cannot be fragmented to further the economic interests of a local guild.

No state has benefited more than Florida from the tremendous industrial expansion of the nation since World War II. Yet no state has resisted more fiercely recognition of the legitimate requirements of national business and financial institutions which have contributed so largely to Florida's burgeoning prosperity. That resistance is manifested here by the increasingly strident efforts of the local accountants, aided by a highly restrictive statute—depression-born and now obsolete in view of Florida's industrialization—and a cooperative regulatory Board, to exclude national accounting firms such as Price Waterhouse from any substantial practice in the state.

(2) The Constitutional Gravity of the Questions.

The resulting Florida regulatory scheme, as applied and upheld below, is fundamentally opposed to the first prin-

ciples of our federalism. Its balkanization of the profession, and of the commercial activity affected by the profession, makes state regulations struck down by this Court in the past seem pallid in comparison.

The statute as a whole appears to offer to national firms temporary certification as the only way of servicing their clients with Florida operations. The Board emphatically sealed that route (Rule 20-9.03), as well as the alternative of permanent certification for all the partners. On the second and last trek through the Florida Supreme Court, only one, final course has been suggested to appellants, namely, to "purchase" the services of local Florida accountants as correspondents. That course is not a meaningful alternative; it merely demonstrates that there are no remaining openings in the statute and that Price Waterhouse is to be effectively excluded from the state.

It is thus clear that appellants have gone to extraordinary lengths during this Sisyphean litigation to satisfy the requirements of Florida's regulatory scheme. In so doing, they have tested that scheme from all sides, thereby building a procedural record for ultimate review by this Court of Chapter 473, Florida Statutes, as applied. We submit that the provisions of that statute inhibiting the practice in Florida of demonstrably qualified accountants—particularly the means of wholesale exclusion implemented by F. S. 473.16 and F. S. 473.23—should be struck down in their entirety as inconsistent with the Constitution and the decisions of this Court.

First. Commerce Clause. National accounting firms such as Price Waterhouse must operate across state boundaries in order to meet the audit needs of clients likewise operating across state boundaries. Hence accountancy as practiced by the Price Waterhouse firm is unquestionably part of the trade and commerce flowing between the states.

See *United States* v. *Shubert*, 348 U. S. 222, 226; *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 549-50.

The activity of Price Waterhouse in interstate commerce on behalf of its many interstate clients with Florida operations is substantially impeded by Chapter 473. That statute therefore imposes an unconstitutional burden on interstate commerce.

The crucial elements of that statute are F. S. 473.16 and 473.23, which require that all of the partners must obtain permanent Florida licenses before any member of the firm can practice on a regular basis in Florida. If, like most other states, Florida required that only the resident partners in Florida be licensed, all requirements of Chapter 473, no matter how onerous, could be met. But F. S. 473.16 and 473.23, as interpreted and applied and in conjunction with the rest of the regulatory scheme, make it literally impossible for the Price Waterhouse firm to qualify simply because its partners are nonresidents. Such discrimination, on grounds unrelated to proficiency, against an out-of-state firm operating in interstate commerce, operates to foster a local monopoly and in no way serves to protect the Florida public.

We recognize of course that Chapter 473 has other purposes in addition to the one challenged here. But its salutary objective of regulating and controlling the practice of accountancy in order to protect the Florida public is not furthered by excluding out-of-state firms such as Price Waterhouse who are entirely willing to submit themselves to local regulation just as they do in the other states. And the fact that all of the other states have been able to regulate their own accountants and at the same time to assimilate the national firms shows presumptively that a nondiscriminatory alternative is available to Florida. As already noted, many states have adopted the Model Bill of the

American Institute of Certified Public Accountants (Ex. 14, sub-Ex. 12), which contemplates a permanent resident office managed by a general partner who is certificated by, and is answerable for his entire firm to, the state's regulatory agency.* Not a single other state has in effect a regulatory scheme such as Florida's.

Having rejected the nondiscriminatory alternative, Florida cannot be heard to rely on notions of protecting the public welfare to justify this anticompetitive aspect of the statute. The Court thus need not explore the possible philosophical differences reflected in such opinions as *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349; *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, and *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. Even under the approach ac-

*In the courts below, the Board contended, without supporting rationale, that F. S. 473.16 is necessary to the maintenance of Florida accounting standards. How this is so, when a resident partner would fully bind his nonresident partners for the protection of the Florida public, is not explained. In any event, if such a provision can ever be justified, it must be under circumstances of liberal and reasonable enforcement when the nonresident firm attempts in good faith to submit all of its partners en masse to the jurisdiction of the regulatory agency, as appellants did here. Instead, the Board arbitrarily denied the handful of reciprocal applications it acted upon on grounds of nonresidence that plainly cannot be complied with by members of a national accounting firm. The applications were not denied on grounds relating to proficiency; indeed, the proficiency or technical competence of appellants has never been challenged or questioned by the Board.

The Board's allusion to possible lowering of standards is particularly suspect, moreover, in view of the remarkable history of the accounting profession in Florida. Chapter 473 was enacted in 1931, at a time when three national firms maintained permanent offices in the state. Those firms have since been exempted from the requirements of F. S. 473.16 by virtue of a "grandfather" proviso in that section. As a result, for the past thirty-five years those national firms have freely operated in Florida without obtaining certificates for their nonresident partners and without any adverse effect on local accounting standards or on the Florida public. *See State Board of Accountancy* v. *Webb*, 51 So. 2d 296 (Fla. 1951), where the grandfather proviso is explained.

cording considerable latitude to state regulation (*e.g.*, the formulation expressed by Mr. Justice Black dissenting in *Hood*, 336 U. S. at 550-64), the present statute cannot stand, because the effect on interstate commerce is so total and discriminatory and because the local interest in exclusion is so unworthy.

Here we are confronted with a statute that goes far beyond the type of regulation condemned in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, where the statute appeared to promote a legitimate state interest in train safety but, unhappily, burdened interstate commerce. In the present case we find a state statute that burdens and actually discriminates against interstate commerce in order to protect a local monopoly. The "sole aim" of F. S. 473.16 is precisely the opposite of that sustained in *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, 445. In view of the national policies reflected by the antitrust laws, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U. S. 341, the state interest in protecting its local guild should not be even weighed in the balance. Indeed, it is not at all clear that the Florida public is benefited in the long run by a form of protectionism that deprives it of ready access to the services of highly trained, widely experienced, professional men. Such an interest can never be justified as permissible state regulation of interstate commerce under the doctrine of *Cooley* v. *Board of Wardens*, 12 How. 298, 319-20. *See Toomer* v. *Witsell*, 334 U. S. 385, 407 (Frankfurter, J., concurring).*

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*The state interest is not supported by analogy to the legal profession. Such an analogy would appear to be self-defeating because the states have far greater reason to require localization of law partnerships than accounting partnerships due to the differences among the states in the subject matter of the lawyer's practice as contrasted with the uniform principles and practices employed by accountants. In fact, however, state regulation of law partnerships is not as restrictive and exclusionary as Florida's regulation of accounting partnerships. There are no special provisions regarding partnerships

Finally, we find compelling support for our position in the culmination of the long series of milk cases decided by the Court under the commerce clause, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361. In that case, which also involved a Florida regulatory scheme favoring local interests, the Court unanimously struck down the underlying statute without even stopping to consider whether there existed a non-discriminatory alternative. The discrimination against interstate commerce in *Polar* was less blatant and less absolute in its impact than that caused by Chapter 473. Perhaps even more compelling is *Railroad Transfer Service, Inc.* v. *City of Chicago*, 386 U. S. 351, where the Court just last Term struck down a licensing scheme far less onerous than the one challenged here.*

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in the state laws and regulations with respect to admission to the bar and the illegal practice of law. *See generally West Publishing Company, Rules for Admission to the Bar* (1963); *American Bar Foundation, Unauthorized Practice Statute Book* (1961). The regulation of law partnerships is thus left to Canon 33 of the Canons of Professional Ethics, which has recently been interpreted by the American Bar Association's Committee on Professional Ethics in its Opinion 136 to permit interstate partnerships. *See* 53 A.B.A.J. 353 (1967).

The increasing interstate mobility of lawyers, however, especially in connection with civil rights cases, is provoking exclusionary efforts in some states. *See* Note, 67 COLUM. L. REV. 731 (1967); Note, 80 HARV. L. REV. 1711 (1967).

*We are not unmindful of a Florida decision ten years ago, *Morgan* v. *Oosterhoudt*, 96 So. 2d 139 (Fla. 1957), an appeal from which was dismissed by this Court for want of a substantial federal question, 355 U. S. 603. There the Florida court held that a Florida-licensed accountant could not practice in that state as a member of a national firm whose partners were not Florida-licensed. While we believe that the *Morgan* case was wrongly decided by the Florida court, it is understandable why this Court dismissed. The federal grounds were not raised until a petition for rehearing in the Florida Supreme Court and then only in conclusional form. *See* Appellees' Motion to Dismiss, No. 623, October Term, 1957, at 6-8. Nor was there any showing made that the statutory scheme, as applied and in light of the conditions then prevailing in Florida, inhibited a non-resident firm from performing required services for its interstate clients under temporary licenses. The record here is entirely different. And even if the constitutional argument had been properly presented and supported, dismissal did not constitute an adjudication on the merits. *Compare Naim* v. *Naim*, 350 U. S. 891, *with Loving* v. *Virginia*, 87 S. Ct. 1817.

Second. Due Process. The impact of the regulatory scheme also denies appellants due process under the fourteenth amendment. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-39. *See* Comment, 56 MICH. L. REV. 415, 418-19 (1958).

Chapter 473 as applied unquestionably deprives the Price Waterhouse partners of the freedom to engage in their chosen professional activity within Florida, and it curtails the freedom of the firm's clients to employ accountants of their choice. This substantial impingement on freedom of contract should be supported by at least some showing of benefit to the Florida public, and no such showing can be made here. Any due process inquiry, therefore, must be undertaken in the context of this wholly inadequate police power justification.*

We start with a statutory scheme suspect on its face, since it is enforced not by a disinterested authority but by a local board whose very members have an economic interest in the subject matter. *Cf. Lathrop* v. *Donohue*, 367 U. S. 820, 878 (dissenting opinion); *Silver* v. *New York Stock Exchange*, 373 U. S. 341. It is subject to the further infirmity that a nonresident accountant has no voice in the membership of the regulatory body or in the closely affiliated local professional group, the Florida Institute, whose interests the Board necessarily reflects. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50. As a result, in so far as Florida and the Board purport to deal

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* The only "justification" that has been advanced so far is Florida's splendid climate, which, according to a Board witness, causes an influx from the North, "a tourist situation." (Ex. 12, pp. 65-66.)

with nonresidents, the political restraints normally present in our society are totally lacking. *Edwards* v. *California*, 314 U. S. 160, 174; *South Carolina Highway Dep't* v. *Barnwell Bros.*, 303 U. S. 177, 185 n.2. Where the legislative policy and the state agency naturally tend to be less responsible, it is incumbent upon this Court to undertake a more searching inquiry into the constitutionality of the regulatory scheme that is challenged. *See United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n.4.

Against this background it is hardly surprising to find that the statutory scheme has been implemented to exclude admittedly competent accountants on grounds utterly unrelated to the protection of any legitimate police power interest, and with the intent and effect of promoting a local monopoly. The statute as applied is thus invalid under the due process clause. That conclusion follows either under the unreasonable, arbitrary, and capricious test traditionally applied or under the "less-restrictive alternative" principle.* Every other state in the Union has found and adopted a "less-restrictive alternative" than Florida's for handling the identical problem of regulating the practice of accountancy.

Third. Equal Protection. The statute and implementing regulations as applied raise substantial equal protection questions.

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*It has recently been suggested that the proper due process approach to economic regulation is the less-restrictive alternative principle, whereby such regulation would violate due process if the state, under its police power, can fully achieve the purposes of the challenged regulation by one or more narrower regulations. Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967). Such an approach is consistent with the Court's formula for determining the validity of governmental regulation infringing fundamental personal liberties. *E.g.*, *Aptheker* v. *Secretary of State*, 378 U. S. 500, 507-14 (travel); *Sherbert* v. *Verner*, 374 U. S. 398, 406-09 (exercise of religion); *Shelton* v. *Tucker*, 364 U. S. 479, 487-90 (speech). *See also Griswold* v. *Connecticut*, 381 U. S. 479, 485-86 (privacy).

"Judicial inquiry under the equal protection clause . . . . must reach and determine the question whether classifications drawn in a statute are reasonable in light of its purpose . . . ." *McLaughlin* v. *Florida*, 379 U. S. 184, 191. The constitutionally permissible purpose of the regulatory scheme can in no event extend beyond necessary protection of Florida residents as consumers of accounting services. That purpose is achieved by ensuring that those persons who hold themselves out to Florida residents as qualified to perform the services of an independent public accountant are in fact so qualified. As the Court said in *Schware* v. *Board of Bar Examiners* with reference to state regulation of the profession of law, "A State can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." 353 U. S. at 239. It is by that purpose—ensuring fitness or capacity to practice—therefore, that the classification drawn in determining appellants' right to practice in Florida must be judged.

Consider the classifications involved here. Florida residents are eligible to obtain licenses to practice accountancy; the nonresident appellants are not. Resident accountants other than appellants who were originally licensed by states which grant "similar privileges" to Florida accountants are eligible for Florida certificates by reciprocity; appellants, no matter how competent, are prevented from receiving such certificates because originally licensed by states which in the Board's view do not grant "similar privileges" to Florida accountants.*

*The Board even applied the "similar privileges" standard discriminatorily against appellants. It rejected license applications by appellants originally licensed in New York, California, Pennsylvania, New Jersey and Massachusetts on the ground those states do not grant "similar privileges" to Florida accountants. Yet the Board had previously issued over 300 reciprocal certificates to out-of-state

All of these distinctions or classifications are palpable denials of equal protection because the criteria for making the classifications have no rational connection with an applicant's fitness or capacity to practice public accounting.

Fourth. Privileges and Immunities. The regulatory scheme as applied also conflicts with the privileges and immunities clause of the fourteenth amendment.

As the *Slaughter-House Cases*, 16 Wall. 36, and subsequent cases have made clear, that clause protects privileges and immunities "which owe their existence to the Federal government, its National character, its Constitution, *or its laws.*" 16 Wall. at 79 (emphasis added). That principle has recently been applied by the Second Circuit *in banc* in *Spanos* v. *Skouras Theatres Corp.*, 364 F. 2d 161 (1966), *cert. denied*, 385 U. S. 987, to a situation closely analogous to the present case. In *Spanos* the court by Judge Friendly held that "under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." 364 F. 2d at 170. Recognizing the increased specialization and interstate mobility of the bar, the court stated that "where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgement must be read to include what is necessary and appropriate for its assertion." This right "must comprehend the right to bring to the as-

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accountants, at least some of whom appear to have been originally certified by those same states. Even the court below characterized such discrepancy as "a bit odd." (Appendix A, p. 9a).

The "similar privileges" requirement was apparently accorded great weight in both courts below, App. A, pp. 5a-7a, 15a, 24a, because of the view that the values at stake in this litigation are founded on nothing more than a "privilege," as distinguished from a "right." *But see, e.g., Schware* v. *Board of Bar Examiners*, 353 U. S. at 239 n.5.

sistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective . . . ." *Ibid.*

Rights and obligations under the federal securities laws are inseparable from the activities of a large number of the Price Waterhouse clients and of the firm itself. Those laws and SEC regulations thereunder require regular and extensive financial disclosures to the investing public, certified by independent public accountants meeting Commission-prescribed qualifications.* Surely the client's duty of thoroughgoing compliance with the federal securities laws must have as its correlative the privilege of free access to the services of whatever independent accountants, recognized as qualified by the Commission, the client thinks "best fitted for the task." *See Spanos* v. *Skouras*, 364 F. 2d at 170. And surely such recognized public accountants, in undertaking the high responsibility of certifying the fairness of financial information broadly disseminated to the national investing public, must likewise be privileged to perform their work "in whatever manner is most effective" to the proper discharge of their obligations to client and public. *Ibid.* Such correlative privileges cannot properly be abridged by the parochial interests of local economic protectionism so manifest in the instant cases. *Cf. Sperry* v. *Florida*, 373 U. S. 379; *Toomer* v. *Witsell*, 334 U. S. 385.

CONCLUSION

These cases boil down to a question whether, in the last third of the twentieth century, Florida or any other state in this Union can exclude from its borders, in the interest

*The Commission will not recognize as qualified any person as a certified public accountant who is not duly registered and in good standing as such under the laws of the place of his residence or principal office. 17 C.F.R. § 210.2-01(a) (1964).

of economic protectionism, unquestionably qualified independent accountants whose services across political boundaries are essential to the unimpeded flow of capital and resources in interstate commerce. For if Florida can properly accomplish the exclusion so far countenanced by its legislature and courts, so can any other state. The ultimate result of such exclusionary regulation on a broad scale would be fragmentation of audit responsibility for the financial statements of multi-state companies among as many local accounting firms as the number of states in which the companies operated. Neither that result, nor its Florida beginnings, can be tolerated in our federal regime.

For all of the foregoing reasons, probable jurisdiction of these appeals should be noted and a hearing on the merits granted.

Respectfully submitted,

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July 22, 1967.